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In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., Master File no. 1:00-1898, MDL 1358 (SAS), M21-88, 2005 U.S. Dist. LEXIS 10781 (S.D.N.Y., May 31, 2005)

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both motions because there were issues of material fact as to whether the City discharged pollutants into navigable waters without a permit.

On remand, Coalition and the City disputed whether the City's conduct constituted a violation of the CWA. Coalition argued that the City's actions were subject to the CWA, and since the City failed to obtain a permit to spray over water, the City violated the CWA. The City argued that the spraying program did not discharge pollutants, so a permit was not required. The second issue was whether Coalition offered sufficient evidence to find as a matter of law that the City violated the CWA. The City disputed most of the offered evidence.

The main goal of the CWA is to eliminate the discharge of all pollutants into navigable waters by restoring and maintaining the chemical, physical, and biological integrity of America's waters. The CWA defines "discharge of a pollutant" to include any addition of any pollutant to navigable waters from any point source. The National Pollution Discharge Elimination System ("NPDES") regulates the issuance of permits that allow the holder to discharge pollutants at levels below the thresholds incorporated in the permit. When sprayed into navigable waters, pesticides may constitute "an addition" under the CWA. The amount of pollutants discharged does not affect whether an addition took place.

Courts have loosely interpreted the definition of "point source" as any discrete conveyance that discharges or may discharge pollutants. The City's helicopters and trucks served to convey pollutants from their original source to the navigable water.

The definition of "pollutant" was the primary controversy in this case. According to the legislative history, courts should interpret "pollutant" broadly. The court noted that although the CWA includes chemical waste in the definition of "pollutant," it failed to define the meaning of chemical waste. The Environmental Protection Agency's position is that pesticides are not chemical waste because pesticides target organisms and remain useful when they are in the environment. Unlike chemical waste discarded in the air, the pesticides had the intended purpose of reaching and killing mosquitoes. Pesticides sprayed by the City could become chemical waste if they were no longer useful and the City discarded them.

Because the court faced disputed issues of material fact, the court denied both parties' motions for summary judgment. The issues of material fact need to be resolved by the trial court.

Tomi L. Hanson

In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., Master File No. 1:00-1898, MDL 1358 (SAS), M21-88, 2005 U.S. Dist. LEXIS 10781 (S.D.N.Y., May 31, 2005) (holding a claim for damages under the relevant California statute did not apply to groundwater contamination).

The cities of Fresno, Riverside, Roseville, Sacramento, and other private citizens and water districts ("California Cities") asserted causes of action under the California Civil Code ("Statute") against Atlantic Richfield Co. and Alon USA Energy, Inc. ("Companies") in the United States District Court for the Southern District of New York. The California Cities sought relief from the actual and threatened contamination of their water supply with the gasoline additive methyl tertiary butyl ether ("MTBE"). Companies moved to dismiss the claims under the Statute, arguing the provision does not apply to the alleged contamination of water, and they moved to strike California Cities' prayers for treble damages and attorneys' fees pursuant to the Statute.

The Statute provided that a utility may bring a civil action for damages against any person who "tamper[s] with any property owned or used by the utility to provide utility services." Companies contended that the district court must dismiss California Cities' claims since the Statute did not apply to the contamination of water, and maintained that the Statute's plain language and legislative history demonstrated that it addressed tampering with equipment used to provide utility services. Specifically, Companies argued that "property" does not include groundwater and "tamper" does not include contamination of groundwater.

California Cities responded that groundwater constituted "property used to provide utility services" since California Cities had usufructuary rights in the water pumped by their wells, and California Cities used it to deliver potable drinking water to consumers. California Cities also asserted that the term tamper covered contamination, as it constituted injury to, alteration of, and interference with property under state law.

The district court looked to the plain meaning of the Statute and to the legislative intent. It noted the concept of property in California is extremely broad, and stated that a liberal interpretation of the word property in the statute would cover California Cities' usufructuary rights. However, when the district court read the term property in conjunction with the rest of the statute, it determined that it did not mean property rights, but rather the physical object to which those rights attach—the instruments used to provide utility services. The district court concluded that to read the Statute as including the right to sue for groundwater contamination would conflict with the rest of the Statute, and conflict with the Statute's legislative history.

California Cities argued the proposition that the legislative purpose does not affect or limit the broad reach of a statute's plain language, citing a California Supreme Court decision. The district court responded, first, that it already determined that the plain language of the Statute precluded California Cities' claims based on groundwater contamination, and second, that the legislative purpose in the Statute was to deter the theft of utility services, not to protect environmental resources, and it could not be interpreted to include it. The district

court then dismissed a claim by private citizens under the Statute, since the Statute only provided for a utility to bring a civil action for damages, which did not include owners of a mobile home park that provide water service. Thus, the district court granted the Companies' motion to dismiss California Cities' cause of action under the Statute and granted Companies' motion to strike California Cities' prayers for treble damages and attorney's fees.

Stacy Hochman

Or. State Pub. Interest Research Group v. Pac. Coast Seafoods Co., 374 F.Supp. 2d 902 (D. Or. 2005) (enjoining Pacific Surimi from processing food due to the irreparable harm pollutant discharges cause to the Skipanon River until Pacific Surimi could obtain a NPDES permit).

On March 15, 2004, the United States District Court for the District of Oregon held Pacific Coast Seafoods Company, Inc., Pacific Surimi Joint Venture, LLC, and Pacific Surimi Co., Inc. (collectively "Pacific Surimi") in violation of the Clean Water Act ("CWA") for discharging pollutants into the Skipanon River. Oregon State Public Research Group ("Group") conducted an on-site inspection of Pacific Surimi and took wastewater samples. The Group filed a motion for a preliminary injunction seeking to enjoin Pacific Surimi from beginning summertime processing until Pacific Surimi either obtained a National Pollutant Discharge Elimination System ("NPDES") permit or treated the water to reduce pollutant discharges.

The court found Pacific Surimi's discharge harmful to both aquatic life and humans due to the exacerbation of already dangerous amounts of ammonia and sulfides, low levels of oxygen, and high levels of bacteria in the Skipanon River. Furthermore, the court found Pacific Surimi in violation of the CWA for each day Pacific Surimi discharged without an NPDES permit. The court ordered a preliminary injunction because Pacific Surimi could not provide credible assurance that they could reroute discharges and not cause irreparable harm.

The CWA authorizes the district court to grant preliminary injunctions to redress violations of the CWA. For the court to grant a preliminary injunction, the Group must show either a likelihood of success on the merits and the possibility of irreparable injury, or that there are serious questions based on the merits, the balance of hardships tips sharply in the Group's favor, and that there is no adequate remedy at law. The court found the Group sufficiently demonstrated a risk of irreparable harm and demonstrated likely success on the merits. Additionally, the court found an equitable balancing analysis unnecessary because the CWA violations were willful.